UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

IN THE MATTER OF:	)	
	)	
Zaclon, Incorporated,	)	
Zaclon LLC, and	)	
Independence Land Development Company,	)	**Docket No. RCRA-05-2004-0019**
	)	
Respondents	)	

ORDER ON MOTIONS TO SUPPLEMENT PREHEARING EXCHANGE AS TO COUNT 2 AND RESPONDENTS' MOTION IN LIMINE

I. Background

The Complaint in this matter, filed on September 29, 2004 by Complainant, United States Environmental Protection Agency Region 2, charged Respondent Zaclon Incorporated with violating the Resource Conservation and Recovery Act (RCRA), as amended, 42 U.S.C. §§ 6901 *et seq.*, by storing hazardous wastes without a permit. Specifically, the Complaint alleged that Zaclon Incorporated owns and operates a facility at which sash and baghouse dust were stored without a permit or interim status for at least six years prior to an inspection on September 19, 2002, in violation of Section 3005(a) of RCRA, 42 U.S.C. § 6925(a) and the state regulations implementing this provision, Ohio Administrative Code 3745-50-45.

An Answer to the Complaint was filed on November 2, 2004, denying the alleged violation. After unsuccessfully engaging in Alternative Dispute Resolution, the parties filed their prehearing exchanges as requested by a Prehearing Order. Complainant moved to amend the Complaint to add Zaclon LLC and Independence Land Development Company ("ILDC") as Respondents to the Complaint.[1] Thereafter, Complainant moved to file a Second Amended Complaint, based on information Complainant received after the Prehearing Exchange from an inspection of Respondents' facility, adding a second count of violation of RCRA which alleges that Respondents illegally received, stored and treated hazardous waste, namely spent stripping acid. By Order dated October 7, 2005, the requests to amend were granted. Complainant filed the Second Amended Complaint on October 14, 2005 (hereinafter referred to as "Complaint"), to which Respondent submitted an Answer.

[1] Zaclon, Inc., Zaclon LLC, ILDC are hereinafter collectively referred to as "Respondents" or "Zaclon."

Complainant filed a Motion for Accelerated Decision on Liability as to Count 1, which was granted on November 3, 2005. On January 9, 2006, Respondents filed a supplement to their Prehearing Exchange for Count 2 of the Complaint, and Complainant filed a Rebuttal Prehearing Exchange as to Count 2 on January 20, 2006.

The evidentiary hearing in this matter was scheduled to commence on May 16, 2006, and a deadline of February 24, 2006 was set for pre-hearing motions, such as motions to amend. Several motions were filed on or about February 24, 2006, including Complainant's Motion for Leave to Supplement Prehearing Exchange for Count 2 of the Second Amended Complaint (EPA's Motion to Supplement), Motion of Respondents to Supplement Prehearing Exchange (Respondents' Motion to Supplement), and Respondents' Motion in Limine to exclude Complainant's Prehearing Exchange Exhibit 34 and testimony of Lieutenant Ollie Zahorodnij (Motion in Limine). Respondent submitted an Opposition to EPA's Motion to Supplement on March 10, 2006, to which Complainant filed a Reply on March 23, 2006. Complainant did not file any response to Respondent's Motion to Supplement. Complainant filed a Response to the Motion in Limine on March 10, 2006.

The evidentiary hearing in this matter was rescheduled and is currently set to commence on June 6, 2006.

II. Respondents' Motion to Supplement

Respondents seek to supplement their Prehearing Exchange with documents marked Respondents' Exhibits 29 through 36 on the basis that they are relevant to the issue as to Count 2 of whether the stripping acid used by Zaclon is exempt from regulation under RCRA. Respondents assert that these exhibits are critical to their arguments on this issue. The Motion to Supplement was filed sufficiently in advance of the hearing, and Complainant has not submitted any opposition to the Motion to Supplement. Accordingly, the Respondents' Motion to Supplement is **granted.**

III. Complainant's Motion to Supplement and Respondents' Motion in Limine

A. Arguments of the Parties on Motion to Supplement

Complainant seeks to supplement its Prehearing Exchange with a Report of Investigation (ROI) (Complainant's proposed Prehearing Exchange Exhibit 35A), along with an Appendix and attachments (Complainant's proposed Prehearing Exchange Exhibit 35B), prepared by Complainant's Civil Investigator, Reginald Arkell, who was previously listed by Complainant as a proposed witness for the hearing in its January 20, 2006 Rebuttal Prehearing Exchange. Complainant states that after the Rebuttal Prehearing Exchange was filed, Mr. Arkell conducted an investigation to determine and document Respondents' history of violations with the City of Cleveland, Ohio. Complainant points out that the ROI includes information as to such

violations, including those documented by the Cleveland Fire Department, and preliminary information from public databases regarding Respondents' ability to pay the proposed penalty.

In addition, Complainant seeks to supplement its Prehearing Exchange to list an additional expert witness, Dr. Christopher Weis, an EPA toxicologist, along with his curriculum vitae (Complainant's proposed Prehearing Exchange Exhibit 36A) and bibliography of peer-reviewed publications (Complainant's proposed Prehearing Exchange Exhibit 36B). He would testify regarding the risk to public health resulting from storage and spills of spent stripping acid, and from fires and spills at facilities where hazardous wastes are stored, such as those at Zaclon's facility.

Respondents oppose the Motion to Supplement on grounds that the proposed exhibits and testimony are irrelevant to the issues in this proceeding. Respondents argue that the alleged violations documented by the Fire Department have no relationship to sash (the material at issue in Count 1) or spent stripping acid (the material at issue in Count 2), and that there have been no documented spills of stripping acid at Respondents' facility. Instead, there are references in the ROI of spills of hydrochloric acid, which is contained in tanks at a different location from the stripping acid. Respondents assert that there has been a "long history of disputes between the Cleveland Fire Department and Zaclon, which is presently being adjudicated . . .in the City of Cleveland and Ohio Court system." Opposition at 2.

As to information about ability to pay in the ROI, Respondents point out that currently pending is Complainant's Motion for Accelerated Decision, seeking to preclude Respondents from introducing testimony on that issue. Respondents assert that the ROI includes irrelevant and sensitive personal and financial information on James Krimmel and Joe Turgeon, who are not parties to this case, but are merely officers of the Respondents. Specifically, Respondents express the concern of identity theft from the social security numbers in the ROI.

Respondents argue that Dr. Weis' testimony is not relevant where there is no evidence of any major spill of spent stripping acid at Respondents' facility, and where there is no indication that he is familiar with the facility.

In its Reply, Complainant states that EPA will not disclose social security numbers or other sensitive personal information under the Freedom of Information Act (FOIA). Complainant offers to redact the ROI to protect the social security numbers regarding Mr. Krimmel and Mr. Turgeon from public disclosure, and any other personal information requested by Respondents, and therefore seeks an Order for Complainant to substitute redacted pages to its proposed Prehearing Exchange Exhibit 35. Reply n. 1. Respondent has not submitted any request for other personal information to be withdrawn from the Exhibit.

Complainants argue in the Reply that the ROI contains information on a history of multiple spills at Respondents' facility, a long history of citations for inadequate fire suppression equipment, a recent fire, a catastrophic spill of hydrochloric acid last year, and orders to remove asbestos and other environmental hazards, all of which are relevant to the penalty to assess for

Counts 1 and 2. Complainants argue that Dr. Weis is not testifying as a fact witness, but as an expert with great experience studying the hazards posed by such facilities as Respondents', based on a study of the record of evidence in this case. Complainant points out that Respondents have admitted that spent stripping acid is primarily hydrochloric acid contaminated with metals. Complainant asserts that some of the problems at the facility are related to the fact that it is not a licensed hazardous waste treatment, storage and disposal (TSD) facility, and that compliance with TSD permit requirements could mitigate some of the hazards.

B. Arguments of the Parties on Motion in Limine

Respondents request that the testimony of Lieutenant Ollie Zahorodnij of the Cleveland Division of Fire and Complainant's Prehearing Exchange Exhibit (Complainant's Exhibit or C's Ex.) 34 be excluded as irrelevant and highly prejudicial. Respondents point out that Lt. Zahorodnij is to testify regarding a fire at Respondents' facility on June 4, 2005, and that Complainant's Exhibit 34 is the Notice of Violation (NOV) resulting therefrom. Respondents argue that general risks are not relevant to the issues in this case unless they directly relate to the violations alleged in the Complaint. Lt. Zahorodnij's testimony and Complainant's Exhibit 34 have nothing to do with speculative accumulation of waste or stripping acid, Respondents assert. Furthermore, the NOV is being litigated in county court. Respondent states that there is no evidence to support Complainant's claim that Lt. Zahorodnij's complaint to the Ohio EPA resulted in the inspection which led to the addition of Count 2 to the Complaint.

In its Response, Complainant asserts that the testimony of Lt. Zahorodnij and Complainant's Exhibit 34 are relevant to the statutory penalty factor "seriousness of violation" and several RCRA Penalty Policy factors, including potential for harm, degree of willfulness and negligence. Complainant states that Lt. Zahorodnij was a witness at the June 4th fire, and that he will testify as to conditions observed at the facility, and may testify as an expert regarding risks to public health and safety posed by the facility, given his observations. The NOV details violations related to chemical spills, unlabeled chemicals, lack of MSDSs (material safety data sheets), and a broken sprinkler system. Moreover, Complainant asserts that the testimony and evidence is responsive to Respondents' claims that its practices are good for the environment and that it has an exemplary compliance history.

C. Discussion

The general issue on a motion to supplement a prehearing exchange is whether the opposing party would suffer any undue prejudice from including the supplement, such as inadequate opportunity to review the new exhibits and prepare cross examination and any rebuttal testimony and evidence in time for the hearing. The Motion to Supplement along with the proposed exhibits and summary of expert testimony were submitted about three months before the hearing date. Respondents have not complained that it is too close to the hearing for adequate review and preparation for hearing. Instead, Respondents make arguments that are

appropriate for a motion in limine. Therefore, its Opposition will be treated as a motion in limine as to testimony of Dr. Weis and Complainant's proposed Exhibits 35 and 36.

Motions in limine are not referenced in the Consolidated Rules of Practice (Rules). As to admission of evidence, the Rules provide that "[t]he Presiding Officer shall admit all evidence which is not irrelevant, immaterial, unduly repetitious, unreliable, or of little probative value . . . ." 40 C.F.R. § 22.22(a)(1). In the absence of administrative rules on a subject, it is appropriate to consult Federal court practice, Federal Rules of Civil Procedure or the Federal Rules of Evidence as guidance in analogous situations. *See, Carroll Oil Co.*, RCRA (9006) Appeal No. 01-02, slip op. at 19, 2002 EPA App. LEXIS 14 (EAB, July 31, 2002); *Asbestos Specialists, Inc.*, 4 E.A.D. 819, 827 n. 20 (EAB 1993); *Wego Chemical & Mineral Corp.*, 4 E.A.D. 513, 524 n.10 (EAB 1993). In Federal court practice, a motion in limine "should be granted only if the evidence sought to be excluded is clearly inadmissible for any purpose." *Noble v. Sheahan*, 116 F. Supp. 2d 966, 969 (N.D. Ill. 2000). Motions in limine are generally disfavored. *Hawthorne Partners v. AT&T Technologies, Inc.*, 831 F. Supp. 1398, 1400 (N.D. Ill. 1993). If evidence is not clearly inadmissible, evidentiary rulings must be deferred until trial so questions of foundation, relevancy, and prejudice may be resolved in context. *Id.* at 1401. Thus, denial of a motion in limine does not mean that all evidence contemplated by the motion will be admitted at trial. Rather, denial of the motion in limine means only that without the context of the trial the court is unable to determine whether the evidence in question should be excluded. *United States v. Connelly*, 874 F.2d 412, 416 (7th Cir. 1989).

Evidence as to the penalty issue must be relevant and of probative value as to the criteria set forth in the statute for determining a penalty. The criteria set forth in Section 3008(a) of RCRA are "the seriousness of the violation and any good faith efforts to comply with the applicable requirements." 42 U.S.C. § 6928(a). Pursuant to those criteria, the RCRA Civil Penalty Policy (October 1990) provides the following factors to be taken into account in calculating a penalty: potential for harm, extent of deviation from a statutory or regulatory requirement, economic benefit of noncompliance, good faith efforts to comply, degree of willfulness or negligence, history of noncompliance, ability to pay, and other unique factors.

Complainant's proposed testimony of Lt. Zahorodnij and Dr. Weis, Complainant's Exhibit 34 and proposed Exhibit 35, may include information that is relevant to one or more penalty factors in the RCRA Penalty Policy. The degree of willfulness or negligence, for example, according to the RCRA Penalty Policy (at 36), should be assessed by consideration, *inter alia*, of whether the violator knew or should have known of the hazards associated with the conduct. Potential for harm should be assessed by considering, *inter alia*, the violation's impairment of the ability of the hazardous waste management system to prevent and detect releases of hazardous waste. *Id.* at 13. History of noncompliance includes consideration of a pattern of disregard of environmental requirements (not only hazardous waste requirements). *Id.* at 37. Complainant's position is that a TSD permit may have reduced the environmental and health risks at the facility. Even assuming that the fires and spills at the facility involved chemicals or conditions that are not the subject of the Complaint, it is possible that any willfulness or negligence in regard to those chemicals or conditions may reflect on the degree of

Respondents' willfulness or negligence, and/or potential for harm, in regard to Respondents' handling of the materials at issue in the Complaint. The issue of "ability to pay" has to date not been excluded from consideration, as Complainant's Motion for Accelerated Decision on the Issue of Ability-To-Pay has not yet been ruled upon. The fact that issues regarding fire and safety hazards are being litigated in court may affect the weight to be given, but does not render clearly inadmissible, any testimony or evidence as to those issues. It cannot be determined at this time that Dr. Weis' testimony, Lt. Zahorodnij's testimony, or Complainant's Exhibits 34, 35 or 36, or any certain parts thereof, are clearly inadmissible for any purpose.

Accordingly, the Complainant's Motion to Supplement is **granted,** and the Respondents' Motion in Limine is **denied**.

ORDER

1. The Motion of Respondents to Supplement Prehearing Exchange, dated February 23, 2006, is **GRANTED.**

2. Complainant's Motion for Leave to Supplement Prehearing Exchange for Count 2 of the Second Amended Complaint, dated February 24, 2006, is **GRANTED.**

3. Respondents' Motion in Limine, dated February 23, 2006, is **DENIED.**

4. Complainant shall provide to the Regional Hearing Clerk, within 10 days of the date of this Order, copies of those pages in its Exhibit 35 redacted to obliterate the social security numbers which appear thereon and, upon receipt of the same, the Regional Hearing Clerk shall shred and properly dispose of the originals of such pages, with the Clerk maintaining a record that such pages were shredded and disposed of in accordance with this Order.

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Susan L. Biro
Chief Administrative Law Judge

Dated: April 24, 2006
Washington, D.C.